IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
UNITED STATES OF AMERICA

United States of America,
Ex Rel. Dale Thomas Vosika
and Rob Thompson,

Plaintiffs,

vs.

Starkey Laboratories, Inc.,

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Court File No. 01-709 DWF/SRN

INTRODUCTION

Defendant's 12(b)6 motion to dismiss for failure to state a claim upon which relief can be granted should be denied. As will be demonstrated and summarized in this memorandum, Defendant has not even attacked the allegations in Plaintiff's complaint, but has asserted a lengthy, incomprehensible factual history that ignores the true issues at hand. The contract between the parties prohibited Defendant from selling certain products at a cost below that provided to the VA. Defendant admits the existence of the contract, as well as the inclusion of the contract provision insuring that the VA received superior prices. Essentially, Defendant admits all provisions in Plaintiffs' complaint, and the court's legal analysis should stop at this point for purposes of the 12(b)6 motion.

PROCEDURAL HISTORY

Plaintiffs/Relators filed their first Complaint, under seal, on April 24, 2001. Relators then filed an Amended Complaint on December 17, 2001. The United States then declined to intervene in this action. Once the Amended Complaint was unsealed, it was served on Defendant in July of 2003.

Defendant moved to dismiss the Amended Complaint under Rule 9. The District Court granted Defendant's motion, without prejudice on February 20, 2004. The court granted Plaintiffs the opportunity to file a Second Amended Complaint, which Plaintiffs did. The Second Amended Complaint was timely filed.

The Second Amended Complaint alleged multiple False Claims Act violations by Defendant, and provided the substantial particularity and detail required under Rule 9. Defendant does not challenge the Second Amended Complaint under Rule 9, but has chosen to move for a Rule 12(b)6 motion to dismiss for failure to state a claim upon which relief can be granted. As this memorandum will demonstrate, Defendant argues irrelevant and extrinsic information that in no way shows Plaintiffs/Relators are unable to state a claim for relief, and as such this court must deny Defendant's motion.

FACTUAL BACKGROUND

Defendant does not allege that the facts in Plaintiffs' Second Amended Complaint are untrue. As such, Plaintiffs will summarize the factual history leading to this action as it relates to the Second Amended Complaint to demonstrate exactly what the contractual price reduction clause alleges.

In February of 1994, the Veterans Administration (hereafter, the "VA") solicited proposals for the purchase of Custom Hearing Aids. As a manufacturer and seller of hearing aids, accessories, parts and supplies, Starkey, through employee Richard Handberg, responded to this solicitation by providing the VA with certain documentation. One of the documents provided to the VA was alleged to be Defendant's complete

Commercial Pricelist. Defendant's response also included an offer for a flat discount on different hearing aids, as well as a flat discount on all options and accessories. [FOIA 000361-70] (Def. Mem. at 4-5).

The VA assigned a contracting officer, Elaine Williams, to review Defendant's offer. Williams identified the VA Negotiation Objectives: "to obtain discounts from offeror's established catalog or commercial price list which equal or exceed discounts offered by offeror to its *most favored customer* for comparable quantities, terms and conditions." (Emphasis added) [FOIA 000295-96] (Def. Mem. June 8, 2004 at 5).

Based on the information provided to her by Defendant, Ms. Williams recommended the VA accept Defendant's offer. The VA agreed and provided a Notice of Award to Defendant which read as follows:

> Awarded discounts are based from your standard commercial pricelist effective February 7, 1994. A copy of the pricelist identifying those products accepted for award is attached herein and made a part of this contract. [FOIA 000258]

Most importantly, the contract between the parties contained the following language:[1]

> I-FSS-390 Price Reduction
>
> PRICE REDUCTION
>
> a. General: This price reduction clause is intended to ensure that throughout the term of the contract, the Government shall maintain its relative price/discount (and or term and condition) advantage in relation to the Contractor's commercial customer(s) price/discount upon which this contract award is predicated. The customer or category of customers upon which the contract award is predicated will be identified at the conclusion of negotiations.[2]

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[1] The contract term between the parties was October 1, 1994 through September 30, 1996. The parties later extended the contract term for an additional year.

[2] Defendant does not sell directly to the public. Instead, Starkey acts as a direct supplier to independent retail dealers. Therefore, all dispensers and dealers sold to by Starkey are in the same "category."

b. (1) Prior to the award of the contract, the Contracting Officer and the offeror shall reach an agreement as to the price relationship between the Government and the offeror's identified customer or category of customers upon which the contract award is predicated. This relationship shall be maintained throughout the contract period. Any change in the contractor's commercial pricing arrangement for the identified customer or category of customers which disturbs this relationship will constitute a price reduction.

b. (2) The Contractor shall report all price reductions made during the contract period to the Contracting Officer along with an explanation of the conditions under which the reductions were made . . .

b. (3) If, after the date of the conclusion of negotiations, the contractor, (i) reduces the prices contained in the commercial catalog, pricelist, schedule, or other documents (or grants any more favorable terms and conditions) offered by the contractor and used by the government to establish the prices with the contract; or (ii) reduces the prices through *special discounts* to the identified customer or category of customers upon which the award was predicated so as to disturb the relationship of the Government to that identified customer or category of customers, price reduction shall apply to this contract for the remainder of the contract period, or until further reduced, or, in the case of temporary price reductions, for the duration of any temporary price reduction period.

b. (5) The Contracting Officer may exempt from the application of this clause any sale at a price below the contract price if caused by an error in quotation or billing, provided adequate documentation is furnished by the contractor immediately following discovery of the error.

(d) Effective Dates and Notifications.

(1) Any price reduction pursuant to (b) above, *shall be effective for the Government at the same time as the price reduction to the other customer . . . The Contractor shall invoice a such reduced price and indicate thereon that the price reduction is pursuant to this Price Reduction Clause* until such time as this contract is modified.

(2) The Contractor shall notify the Contracting Officer in writing of any price reduction as soon as possible but not later than 10 calendar days after the effective date. Failure to give timely notice shall require that such price reduction (including temporary price reductions) apply to the contract for the duration of the contract period, or until the price is further reduced . . .

(e) Contractor's Statement of Price Reductions.

> The contractor shall furnish within 10 calendar days after the end of the contract period a statement certifying either (1) that there was no applicable reduction; or (2) that any price reduction was reported to the Contracting Officer.
> (Emphasis added) (Pl. FOIA Resp. at 490-496).

Defendant has violated the Federal False Claims Act by failing to provide the VA with price discounts that were secretly and knowingly provided to other customers during the entirety of the contract period with the VA.

Plaintiffs clearly alleged in their Second Amended Complaint that during the contract period with the VA, Defendant provided various dealers with special discounts that were not provided to the VA. These discounts included "quantity discounts," "actual discounts," "efficiency tanks," "battery tanks," and "equipment tanks." The intent of these discounts was to evade the requirements of the contract that Defendant had with the VA, which provided that Starkey was not to sell any of the products sold to the VA at a price higher than that which it sells to any other customers. Essentially, these discounts would not be reflected on invoices between Starkey and its customers. Instead, Starkey would kick back a portion of the purchase price of the hearing aids, anywhere from 50% to 100%, into a special account for the individual dealer, which would then be applied to the future purchase of Starkey hearing aids by that dealer. (Complaint ¶ 21-23). The ultimate result of these discounts was that a number of dealers that purchased hearing aids from Starkey paid a price far less than that paid by the VA, in violation of the contract between the parties.

Plaintiff Relators have provided substantial documentation in their Second Amended Complaint to support these allegations. Plaintiffs also witnessed these schemes first hand. Additionally, various Starkey Executives acknowledged the existence of these schemes to defraud the United States government. In fact, the Starkey executive responsible for negotiating with the VA and the contract between the parties, Richard Handberg, was overheard at various times discussing the fraud with Starkey owner William Austin. Handberg then told Plaintiff/Relator Rob Thompson that if he were audited by the VA and this fraud was exposed, he would be able to "talk his way out of it." (Compl. ¶ 26) Additionally, Richard Handberg created a special computer program that specifically identified sales to dealers that were in violation of the contract with the VA. He told Thompson that he had named the program, "Keep Dick out of jail." (Compl. ¶ 27).

Essentially, Defendant knew it had not provided an accurate and complete commercial pricelist at the time of contract formation, and knew it provided additional discounts to certain customers during the term of the contract, as evidenced by the great steps taken by various Starkey employees to ensure the VA did not learn that Starkey continued to violate the contractual price reduction clause.[3]

Defendant has chosen to respond to these allegations by moving to dismiss under Rule 12(b)6. In support of this motion, Defendant has attempted to have this court consider negotiation information that is not only irrelevant, but extrinsic and inadmissible. At no point does Defendant deny the existence of the contract between the parties, or of the inclusion of the particular language of the contract cited by Plaintiffs. [4] If Defendant contended that no contract existed, or that the contract provisions cited by Plaintiffs were non-existent, a Rule 12(b)6 motion to dismiss could at least be argued in

[3] For a complete discussion of the dealers that received the special discounts not provided to the VA, the names of the Starkey employees involved, as well as the specific prices paid, please refer to the Second Amended Complaint generally.

[4] Actually, Defendant acknowledges the existence of the price reduction clause in the contract. *See*, Def. Mem. at 7.

good faith. Instead, Defendant presents an argument that is inherently inappropriate for a motion to dismiss under Rule 12(b)6: one of interpretation of the contract terms. Namely, Defendant argues that somehow the price reduction clause should not be enforced according to its clear meaning.

In its memorandum, Defendant seems to claim that there was not a “meeting of the minds” in reference to the contract between the VA representative and Starkey. This argument fails and should be disregarded by the court. First, Defendant’s argument is self-contradictory, in that Defendant states that nearly 7 months of negotiations took place between the parties, and that the resulting price reduction clause was only “boilerplate” language. (Def. Mem. at 7). Although Defendant fails to define exactly why this clause constitutes “boilerplate” language, if it is in fact language typical of government contracting, it shows that the language is basic and clear, and that one contracting with the government should be held to such basic terminology. Further, if Defendant objected to this clause, Defendant should have refused to include it in the contract, but failed to do so.

Second, Defendant’s argument on this point is irrelevant, as it seeks to have the court consider evidence outside the contract, something inappropriate under these circumstances.

It should also be noted that nowhere in Defendant’s Memorandum of Law supporting its motion to dismiss does Defendant point out that regardless of the content of the negotiations, *the negotiations themselves were fraudulent*, because the information provided to the VA was not accurate, and Defendant’s employees knew it was not accurate at the time it was provided.

Additionally, Defendant incorrectly states in its memorandum that, "Relators have not alleged that Starkey reduced the prices on its February 4, 1994 commercial pricelist during the duration of the VA contract." (Def. Mem. at 8). In fact, Plaintiffs alleged specifically that the commercial pricelist given to the VA by Starkey was fraudulent. Plaintiffs have provided in Exhibit 2 attached to the Second Amended Complaint, a price list for Trinity Hearing Aid Company that demonstrates that prices to other dealers were reduced during the duration of the VA contract. [5]

In sum, Defendant's Rule 12(b)6 motion must fail, as Plaintiffs' Second Amended Complaint shows a valid claim under the Federal False Claims Act. Plaintiffs are not alleging mere technical non-compliance with a contract provision, nor inadvertent mistakes that lead to billing errors. Plaintiffs are alleging a specific, affirmative, and complex scheme by a national corporation to defraud the United States Government, that occurred prior to entering into the contract with the VA, and continued during the duration of the contract.

Defendant seeks dismissal by asking this court to consider irrelevant information extrinsic to the contract between the parties, and to resolve issues that are inherently for a jury to decide. Defendant does not deny the existence of the contract or the price reduction clause, nor does Defendant point out that the negotiations that resulted in the contract (as mentioned, these negotiations are extrinsic to the contract) were fraudulently conducted by Starkey.

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[5] As discussed more thoroughly in the complaint, Trinity was not the only beneficiary of price reductions during the contract period with the VA. *See generally,* Plaintiff's Second Amended Complaint.

STANDARD FOR RULE 12(b)(6) MOTION TO DISMISS

A complaint is not to be dismissed for failure to state a claim upon which relief can be granted (Rule 12(b)6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim entitling him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The factual allegations of a complaint are assumed true and construed in favor of the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence in support of his claim. *Id*.

ARGUMENT

I. As Plaintiffs have sufficiently alleged a violation of the Federal False Claims Act in their Complaint, a dismissal under Rule 12(b)6 is inappropriate.

The Federal False Claims Act (FCA) 31 U.S.C.S. § 3729 et. seq., provides for civil penalties against "any person" who "knowingly presents, or causes to be presented, to . . . the United States Government . . . a false or fraudulent claim for payment or approval." § 3729(a)(1); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003).

In 1986, Congress amended the FCA "to encourage any individual knowing of Government fraud to bring the information forward." S. REP. NO. 345, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. "To revitalize the *qui tam* provisions, the amendment provided incentives for private enforcement, including increased monetary awards, adopted a lower burden of proof, and allowed the qui tam plaintiff to remain a party to the action even if the Government intervenes." *United States ex. rel. Stinson v. Prudential Insurance Co.*, 944 F.2d 1149, 1154 (3rd Cir. 1991).

Liability under the False Claims Act occurs when a person

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid. *United States ex. rel. Mikes v. Straus*, 274 F.3d 687, 695 (2nd Cir. 2001).

The facts plead by Plaintiffs are more than sufficient to support a claim under the Federal False Claims Act, and therefore a dismissal under Rule 12(b)6 is inappropriate. Plaintiff's have not simply relied upon, "conclusory allegations or legal conclusions," as is alleged by Defendant throughout its memorandum of law supporting its 12(b)6 motion.

Plaintiffs have alleged that not only did Defendant "knowingly" defraud the federal government at the time Defendant entered into the contract with the VA by providing a price list it knew to be inaccurate, but "knowingly" sold identical products to dealer and dispensers other than the VA at prices in violation of the parties' contract. (Complaint ¶ 19-28) Plaintiffs have also alleged that following the creation of the contract and during the entire duration of the contract period, Defendant continually and systematically presented to the VA (and thus the United States Government) "false or fraudulent claim(s) for payment or approval." (*See Generally*, Second Amended Complaint). The claims were "false or fraudulent" because they were in violation of the pricing terms contained in the contract between the parties.

Plaintiffs have not relied upon baseless allegations, as Defendant would like this court to find. To the contrary, Plaintiffs have provided the court with specific documentation to support much of their claim, along with reference to documentation that can easily be obtained via discovery. A closer examination of Plaintiff's Second

Amended Complaint provides this court with evidence of a detailed, complex scheme by Defendant to defraud the United States. Such fraud is the very reason the Federal False Claims Act was initially created and the driving force behind subsequent amendments. *See, Cook County,* 538 U.S. at 121 ("… the basic purpose of the 1986 amendments was to make the FCA a more useful tool against fraud …)

Most importantly for purposes of Defendant's Rule 12(b)6 motion, and as all federal courts presented with 12(b)6 motions agree, the question is not whether or not Plaintiffs can prove the allegations found in their Second Amended Complaint. Rather, this court must assume the allegations and facts in Plaintiffs complaint are true, and determine whether or not a claim based on these allegations and facts can lie. *See, e.g., Scheuer*, 413 U.S. at 236.

If this court takes the allegations made by Plaintiffs as true, that Defendant not only fraudulently negotiated with the VA by providing inaccurate data upon which the VA relied in awarding Starkey a government contract, but also knowingly provided prices to various dealers at rates in violation of the contract between the parties, and thereby continually submitted false claims to the government for payment, then the court must also deny Defendant's motion.

II. In determining whether Plaintiffs have stated a claim sufficient to prohibit a rule 12(b)6 motion to dismiss, this court should not consider extrinsic evidence offered by Defendant, as such evidence is barred by the parol evidence rule.

Federal courts agree that as a general proposition of contract law, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. *See, e.g., Wayland Inv. Fund, LLC v. Millenium Sea Carriers, Inc.*, 111 F. Supp. 2d 450, 454 (S.D.N.Y. 2000). "Evidence outside the four corners of the document as to what was really intended but was unstated or misstated is generally inadmissible to add to or vary the writing." *Id*. Thus, the parol evidence rule bars the consideration of extrinsic evidence of the meaning of a complete written agreement if the terms of the agreement are clear and unambiguous. *Id*.

The 8th Circuit Court of Appeals applies the parol evidence rule in an identical manner. Parol evidence is generally inadmissible to vary the terms or clarify the meaning of a fully integrated writing. *Bunker v. Meshbesher*, 147 F.2d 691, 697 (8th Cir. 1998). Unless an agreement is incomplete or ambiguous, parol evidence is inadmissible to vary, alter, or contradict the written agreement. *Le Neave v. North American Life Assurance Co*., 854 F.2d 317, 320 (8th Cir. 1988). "The parol evidence rule provides, essentially, that evidence of understandings and *negotiations* concerning a written instrument is inadmissible to vary, alter or contradict the terms of the written instrument when that instrument is complete and unambiguous." (Emphasis added) *Sullivan v. United States*, 363 F.2d 724, 727 (8th Cir. 1966), *cert. denied*, 387 U.S. 905 (1967). Parol evidence is inadmissible to show that a writing was executed with the understanding that it would not be binding according to its terms. *Id*.

Defendant does not allege that a contract did not exist between the parties. At no point does Defendant allege that the price reduction clause cited by Plaintiffs (*See*, Pl. FOIA Resp. at 490-496) was not included in the contract. Quite the opposite, Defendant acknowledges the inclusion of the price reduction clause (Def. Mem. at 7).

Further, Defendant does not allege that the contract is incomplete, or that the price reduction clause or any other clause is ambiguous. Instead, Defendant argues that the parties, through previous "negotiations," did not intend for the price reduction clause to have the plain meaning the clause exhibits. For example, Defendant states that during negotiations, the VA's contracting officer, Ms. Williams, did not set forth that Starkey's offer was to include prices given to a "most favored customer." (Def. Mem. at 5). Defendant acknowledges, however, that Ms. Williams' pre-negotiation memorandum showed that the VA's objective was to obtain prices "offered by offeror to its most favored customer." *Id*.

Most importantly, the contract is clear on this point. It includes all of Starkey's dealers and/or dispensers. If Starkey had desired to exclude certain dealers or dispensers, this should have been included in the contract, instead of now arguing after the fact that this is what the parties truly intended. Defendant acknowledges in its memorandum supporting its current motion that "All of Starkey's customers are dealers and dispensers." (Def. Mem. at 4). These types of claims are the precise reason the parol evidence rule exists.

Federal Courts have previously faced exactly the type of argument Defendant now sets forth in government contract disputes. For example, in *Eaton Corp. v. United States*, 591 F.2d 682 (Fed. Ct. Cl. 1979), a government contractor argued that certain dealers were not customers, and therefore not subject to the price reduction clause in the parties' contract. The court used the plain definition of "customer," and ruled in favor of the United States government. It is apparent the court would have ruled differently had the contracting party specifically excluded certain customers from the language of the contract, but not having done so, the contractor was found liable. *Id*. at 687-688.

Next, Defendant states that the parties truly intended to only require Starkey to provide discounts from its "standard commercial price list," and that the prices offered to certain customers were never included on this price list. (Def. Mem. at 5). Defendant goes on to state that near the end of the negotiations between the parties, Ms. Williams never specifically identified certain "most favored customers." *Id.* at 6.

Although Defendant cites General Services Administration guidelines throughout its memorandum, Defendant failed to include the following language, which shows that the price reduction clause is intended to reach all of the Defendant's customers, in the absence of contract language to the contrary:

> The Government's goal when negotiating MAS contract pricing arrangements is to obtain a discount from a firm's established catalog or commercial pricelist which is equal to or greater than the discount given to that firm's most favored customer. The Most Favored Customer discount is *equal to the best discount given by a firm to any entity with which that firm conducts business*. (Emphasis added) (GSA 001390)

Essentially, Defendant asks this court to add certain provisions and exclusions to the contract between Starkey and the VA based on Starkey's internal practices and what Starkey claims was what it really meant during contract negotiations. Defendant never indicated that certain customers should not be included among the "dealers (dispensers)" upon which the contract award was predicated, nor was this provision included in the fully integrated contract between the parties. Defendant never indicated that its commercial pricelist upon which the contract was based should not include prices offered to certain other dealers, nor was this provision included in the fully integrated contract between the parties.

The parol evidence rule is intended to prevent the type of argument Defendant sets forth, to prevent sophisticated parties from arguing that a complete, written contract does not have the plain meaning that it appears to have, or that the parties really intended something else, based on "previous negotiations." Given the application of the parol evidence rule in contract law, which prohibits the introduction of extrinsic evidence to vary, contradict or alter a fully integrated writing, this court should hold Defendant to the language of the contract, ignore Defendant's claims that the parties intended something else, and enforce the price reduction clause according to its clear, literal language.

III. Even if the price reduction clause is determined to be "boilerplate" language, this court should enforce the provision according to its clear, literal meaning in ruling on Defendant's 12(b)6 motion to dismiss, as the parties were each sophisticated negotiators that agreed to include the provision in the contract.

Contract language must be given its plain, ordinary meaning. *NLRB v. Superior Forwarding,* 762 F.2d 695, 697 (8th Cir. 1985). Where sophisticated parties have negotiated a contract, and have access to legal counsel if necessary, and both parties agree to the contract language, the parties will be presumed to be fully aware of the terms of their agreement. *Pilon v. University of Minnesota,* 710 F.2d 466, 468 (8th Cir. 1983). Thus, the court must not denigrate or render ineffective contract language solely because it may be deemed "boilerplate." *Grant County Sav. & Loan Assoc. v. Resolution Trust Corp.*, 968 F.2d 722, 725 (8th Cir. 1992); *citing, Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 648 (9th Cir. 1980).

Defendant insinuates that because the price reduction may be deemed as "boilerplate" language, that it is somehow ineffective, or should for some reason be interpreted in a manner other than according to its "plain, ordinary meaning." (*See, e.g.*, Def. Mem. at 7, 14). In fact, the opposite conclusion is true.

The parties negotiated the terms of the contract for approximately 6-7 months. The parties are each sophisticated entities, well schooled in negotiations. The fact that two sophisticated parties included the price reduction clause in an extensive, thorough contract preceded by months of negotiation shows that in fact the price reduction clause was intended to have meaning.

Defendant admits the contract between the parties includes the price reduction clause. (Def. Mem. at 7). Given the circumstances of the parties during the negotiations that led to the formation of the contract, this court must enforce the clause according to its plain, ordinary meaning, and hold Defendant to the terms of the price reduction clause.

IV. A dismissal under Rule 12(b)6 is improper in this matter, as contrary to Defendant's assertions, Plaintiffs' complaint does much more than allege technical violations under the FCA.

As correctly pointed out by Defendant, the FCA requires more than innocent mistakes or negligence. *United States ex. rel. Quirk v. Madonna Towers, Inc.*, 278 F.3d 765, 767 (8th Cir. 2002) (Def. Mem. at 9)[6]. Additionally, for a technical breach of contract to be actionable under the FCA, knowledge of the falsity is required. *Id.*

Defendant cites numerous cases to support the above propositions. However, Plaintiffs have not alleged that Defendant was simply in technical non-compliance with the provisions of the contract, or that Defendant is guilty of a "simple contract breach." (Def. Mem. at 10). Instead, Plaintiffs have alleged specific fraud by Defendant upon the United States government. Plaintiffs have alleged that Defendant not only knowingly deceived the VA during contract negotiations between the parties, but that Defendant continually and systematically took covert action to ensure that the VA never learned that

[6] On page 9 of Defendant's memorandum, Defendant cites two cases as authoritative on the primary purpose of the FCA. However, the cases cited by Defendant are from 1977 and 1958, while the latest amendments to the FCA occurred in 1986. The true purpose of the amendments is not as limited as Defendant claims, but rather, is to prevent all types of fraud and abuse in all government programs, and all government procurement. 31 U.S.C.S. § 3729-3733.

Defendant was in violation of the terms of the contract between the parties. The contract violations by Defendant were not the result of simple mistakes. Instead, Defendant purposely created computer programs, confusing and misleading pricing schemes, under the table discounts and other means to deceive the VA and sell its products to the VA in violation of the contract between the parties. Defendant's deceit began during negotiations with the VA, and continued and expanded during the duration of the contract between the parties.

Thus, contrary to Defendant's assertions, the violations by Defendant are not, "Expressions of opinion or errors based simply on faulty calculations or flawed reasoning." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) (Def. Mem. at 10). Plaintiffs have alleged specific, widespread, and continuous fraud by Defendant, and for purposes of a Rule 12(b)6 motion, Plaintiffs' allegations must be accepted as factually true. Thus, Defendant's motion must be denied.

V. Defendant's 12(b)6 motion must be denied, as contrary to Defendant's assertions, the contract between the parties did not need to address specific product configurations, and therefore a comparison with sales made to other dealers shows that Defendant violated its contract with the VA.

Defendant claims that the contract between the parties was based only on the commercial pricelist, regardless of whether it included prices to all dealers and/or dispensers, and that since the commercial pricelist did not mention any specific product configurations, that the commercial pricelist was intended to be indicative of a "general range of discounts which Starkey provided to its customers." (Def. Mem. at 11). Therefore, Starkey claims that since the pricelist was only general, and provided only a sampling of pricing, that they were not in violation of the contract.

Once again, as part of this discussion, Defendant asks this court to consider extrinsic information that should be barred pursuant to the parol evidence rule, by attempting to introduce the "negotiation record" maintained by the VA. *Id.* Additionally, it should be noted by the court that nowhere in the contract between the parties is the price list qualified as only a "sampling" of the prices offered by Starkey to its dealers and/or dispensers.

The price list was not a sampling, as evidenced by the language of the contract, which addressed *all* product configurations. As is evident from the review of the Starkey's product catalog, the VA chose to purchase only a few of the types of hearing aides sold by Starkey. Everything purchased by the VA under the contract was discounted, regardless of the specific configuration. *All accessories* were also discounted. (Compl. ¶ 9)

According to the contract, these prices did not change, regardless of the specific configuration of each model. Therefore, simply because the price list did not include reference to all product configurations is irrelevant.

Plaintiffs' Second Amended Complaint alleges, and Defendant does not deny, that the contract between the parties identified specific products. The contract did not include all Starkey hearing aids, and therefore did not have to list all specific products.

As part of this argument, Defendant also claims that since Ms. Williams, the VA contracting officer, did not examine Starkey's business records to verify all submitted pricing data before awarding the contract as she is entitled to do, that this somehow made Starkey's offer fair and reasonable. (Def. Mem. at 12).

This argument is irrelevant, for the simple reason that it is not Ms. Williams' duty to detect fraud by parties contracting with the VA. Her duty is simply to make sure the VA's contracting objectives are met. As pointed out by Defendant, this objective is, "To obtain discounts offered by offeror to its most favored customer for comparable quantities, terms, and conditions." (Def. Mem. at 13).

VI. Defendant's Rule 12(b)6 motion should be denied as the *Data Translation* case is both non-controlling and unpersuasive in this matter, and the contract at issue is not subject to judicial interpretation.

Contrary to Defendant's claim, the case of *United States v. Data Translation*, 984 F.2d 1256 (1st Cir. 1992) is hardly a "precedential benchmark" for FCA claims arising from government contracting. (Def. Mem. at 15). Quite the opposite, *Data Translation* is not only un-controlling in this matter, but should not even be considered as persuasive by this court in ruling on Defendant's Rule 12(b)6 motion to dismiss.

Defendant cites *Data Translation* for the proposition that a practical, not literal, interpretation of the contract between the parties is required as a matter of law before imposing FCA penalties. (Def. Mem. at 15-16). This statement is a far over generalization of the true holding of the case.

First off, it should be noted that the *Data Translation* case has never been cited for the specific proposition urged by Defendant in the 8th Circuit or any other federal court. Given the clear isolation of this case, it can hardly be considered as groundbreaking as Defendant would like this court to believe.

Secondly, the 1st Circuit Court of Appeals was not affirming a dismissal of the government's action, or of a summary judgment ruling in Defendant's favor. Rather, the court was reviewing a *jury verdict* that found the Defendant not guilty on the government's FCA claims. *Data Translation*, 984 F.2d at 1256-57.

Thirdly, the reason the contract clause at issue in *Data Translation* was subject to practical interpretation by the court was clearly a product of the wording of the contract clause itself. The *Data Translation* contract clause was not only vague, but impossible to comply with. *Data Translation,* 984 F.2d at 1259-60. The court determined that if this vague clause was read literally, it would require the contracting party to provide the government with *every* discount *ever* provided to any customer during the company's existence. It was only in this context of impossibility that the court found that the parties' could not have intended a literal interpretation of the clause. *Id*. at 1261. Notably, the court specifically cited the testimony of a government contracting agent *at trial*, to support its decision. The agent acknowledged that he had never seen anyone comply with the language of the contract provision, or known of any contractor that had complied truthfully with the mandates of the clause at issue. *Id.* at 1261-62.

Although Defendant claims the clause at issue is "boilerplate," Defendant never claims that the clause is impossible to comply with, or that the clause is somehow ambiguous. This would be difficult for Defendant to do, since the clause is neither, as evidenced by its extensive inclusion in government contracts. Instead, Defendant chooses to introduce incomprehensible evidence of all of the negotiations that lead up to contract formation with hopes that this somehow supports their claim that the contract doesn't mean exactly what it says.

Fourth, and most importantly, the true crux of the *Data Translation* FCA decision was the court's reliance on the lack of knowledge by the defendant of any wrongdoing.

The 1st Circuit Court of Appeals upheld the District Court's decision, which was based on evidence presented *at trial*, that Defendant had no knowledge of any wrongdoing, and thus was found not liable. *Id.* at 1266-67.

The elements from the *Data Translation* case are wholly absent in this matter. First, this is not a review of a jury verdict, but an attempt to avoid having the case heard on the merits. Second, the price reduction clause is not vague or ambiguous, and Defendant does not contend as much. The clause simply provides that the "contract is predicated on the Government receiving terms better than the terms you offer your dealers (dispensers)." [FOIA 000259] (Def. Mem. at 7). This clause, when read literally, does not require Defendant to "reveal *every* price discount it provided *any* of its customers ever . . ." *Data Translation,* 984 F.2d at 1260. It simply prohibits Defendant from selling to dealers and/or dispensers other than the VA at a price less than that offered to the VA, without also providing these discounts to the VA. The clause only requires this disclosure by Starkey during the contract period.

Thirdly, Plaintiffs are alleging not only knowledge of wrongdoing by Defendant's employees, but an affirmative and continual plan to ensure the government was defrauded and that their wrongdoing would not be detected. Such was not the case in *Data Translation*.

In contrast to Defendant's assertion that *Data Translation* should influence the court's decision in this matter, other federal court decisions are more persuasive. For example, the previously cited *Eaton Corp.* court upheld the decision of the Armed Services Board of Contract Appeals, which held that the "price warranty clause" in the contract between the parties, similar to the price reduction clause at issue here, provides that the contractor warrants that the prices to be paid by the Government are as low as those charged by the contractor to *any commercial agency*. The Board and the Federal Court of Claims agreed that for purposes of the price reduction clause, a contractor violates the clause by giving a discount to its dealers and not to the government, and that all dealers were to be included under the clause language in absence of language to the contrary. *See generally, Eaton Corp. v. United States,* 591 F.2d 682 (Fed. Ct. Cl. 1979); *Appeal of Eaton Corp.*, ASBCA 17713, 74-2 BCA 10697 (1974).

In *Appeal of Racon, Inc.*, GSBCA 3628, 73-1 BCA 9789 (1972), the Board of Contract Appeals also held that under a price warranty or reduction clause, comparability has nothing to do with price differentials between the prices charged to the Government and to private concerns. Instead, it is a matter of percentages, meaning that the government is entitled to the same percentage reduction as is given to commercial accounts, even if it results in the contractor's suffering a loss on its government orders. *See Id., generally.*

These Board of Contract Appeals cases are not necessarily binding on this court, but illustrative of how non persuasive the *Data Translation* case is in this matter. A review of *Data Translation* shows that this case cannot be relied upon to support Defendant's motion. *Data Translation* is an isolated case confined to its facts, with circumstances not present here, and has never once been cited by another court for the proposition urged by Defendant. Instead, cases such as *Eaton Corp.* dictate a different result. Therefore, Defendant's Rule 12(b)6 motion to dismiss must be denied.

VII. Defendant has used the wrong date in making its statute of limitations argument, and this court should find that the Statute of Limitations on Plaintiffs False Claims Act claim did not begin to run until the all transactions under the contract were complete.

Six years is the *minimum* statute of limitations period under the False Claims Act. 31 U.S.C.S. § 3731(b); *Jana Inc. v. United States,* 36 Fed. Cl. 447, 450 (1995). However, the statute of limitations should not exceed ten years following commission of the violation. *Id.* Generally, a six year limitations period applies in False Claims Act cases where the United States declines to intervene. *United States ex rel. El Amin v. George Washington University,* 26 F.Supp. 2d 162, 170-73 (D.C.Cir. 1998); *United States ex rel. Fisher v. Network Software Associates, Inc.*, 180 F.Supp.2d 192, 194 (D.C. Cir. 2002).[7]

In False Claims Act actions where the action is based on a contract, the statute of limitations does not begin to run until the government makes final payment pursuant to a series of transactions under the contract. *TS Infosystems*, 36 Fed. Cl. 570, 573 (Ct. Cl. 1996), *citing, United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2nd Cir. 1993); *United States v. Incorporated Village of Island Park,* 888 F.Supp. 419, 441-42 (E.D.N.Y. 1995); *United States ex. rel. Hartigan v. Palumbo Bros. Inc.*, 797 F.Supp. 624, 629 (N.D.Ill. 1992); *United States ex rel. Duvall v. Scott Aviation,* 733 F.Supp. 159, 161 (W.D.N.Y. 1990); *Blusal Meats, Inc. v. United States,* 638 F.Supp. 824, 829 (S.D.N.Y. 1986) *aff'd*, 817 F.2d 1007 (2nd Cir. 1987).

The Second Amended Complaint in this matter is based upon a contract claim with defined dates of beginning and termination. Under the *TS Info Systems* line of cases, the statute of limitations under the FCA does not begin to run until the Government makes the final payment on the final transaction under the contract. Therefore, the statute

[7] As this Court's order of June 23, 2003 states, the United States declined to intervene in this action.

of limitations did not begin until the contract period had expired, and none of the submissions made by Starkey to the government are outside the limitations period.

Defendant attempts to persuade this court that *TS Info Systems* should not be relied upon by making a statement oft used by parties faced with authority directly contradictory to their position: that the case was wrongly decided. To support this proposition, Defendant claims that the Federal Court in *TS Info Systems*, Judge Moody R. Tidwell presiding, wrongly interpreted and applied the cases cited as authoritative on this subject. (Def. Resp. at 12-14) Such an argument should not be acknowledged by this court.

In contrast to Defendant's assertions, *TS Info Systems* continues to be cited as authoritative by courts when facing statute of limitations arguments in FCA cases. *See, e.g., Allen v. Beta Construction,* 309 F.Supp.2d 42, 48 (D.D.C. 2004) (citing *TS Info Systems* for the proposition that, "many courts have held that the commission of the violation occurs on the date of the government's *final payment* on the false claim. (Emphasis in original))

Even if Defendant's argument as to the application of the statute of limitations was to be accepted as correct, Defendant has used the wrong date when applying its interpretation of the statute of limitations. Defendant has used the date of the Amended Complaint, December 18, 2001, when concluding that some of the fraudulent submissions by Starkey are time barred. However, it is a basic proposition of civil procedure that statutes of limitation begin to run from the date of the original Complaint, not subsequent amendments to that Complaint. Fed. R. Civ. P. 15(c) (2004). As this court is well aware, the original Complaint remains under seal, but given the few claims that would be barred given Defendant's interpretation of the statute of limitations under the FCA, all claims would likely fall within 6 years of the original complaint's filing.

What is most notable, however, when addressing Defendant's statute of limitations claim, is that the contract itself addresses the issue. The contract between the parties provided as follows:

(d) Effective Dates and Notifications

(2) The Contractor shall notify the Contracting Officer in writing of any price reduction as soon as possible but not later than 10 calendar days after the effective date. Failure to give timely notice shall require that such price reduction (including temporary price reductions) apply to the contract for the duration of the contract period, or until the price is further reduced.

(e) Contractors's Statement of Price Reduction

The contractor shall furnish within 10 calendar days after the *end of the contract period*, a statement certifying either (1) that there was no applicable reduction; or (2) that any price reduction was reported to the contracting officer. (Pl. FOIA Resp. at 495-96).

By including these clauses, the parties not only showed their intent to treat the contract as a series of transaction (not as a group of smaller contracts as contended by Defendant), but also demonstrated an intent to reconcile all contract dealings *following completion of the contract*, namely that Defendant was to certify that every transaction that occurred during the 3 years the contract was in place was in compliance with the price reduction clause.

As Defendant agrees, the contract ended September 30, 1997. Defendant must have made their certification that they were not in violation of the price reduction clause within 10 days of the conclusion of the contract. The six year statute of limitations, when applied to the conclusion of the contract, extended until September 30, 2003. Not only was Plaintiffs' original Complaint filed within this time period, but their First Amended Complaint was filed on December 17, 2001, some 21 months before the statute of limitations expired. Therefore, the statute of limitations does not bar any of Plaintiffs' claims.

CONCLUSION

Defendant's rule 12(b)6 motion must fail. Plaintiffs have thoroughly alleged a valid claim under the Federal False Claims Act. For purposes of Defendant's motion, these allegations must be taken as true. Plaintiffs claim is based on the contract entered into by Starkey with the VA. Defendant does not deny the existence of the contract, or the existence of the price reduction clause violated by Defendant. Defendant instead contends that the price reduction clause does not mean what it says, and improperly asks this court to consider extrinsic information in violation of the parol evidence rule.

Defendant also contends that since the price reduction clause is "boilerplate," that it should be given something other than its "plain, ordinary meaning." The fact that this language is always included in government contracts, and was included in the contract between the parties following months of negotiation, shows that this "boilerplate" language was intended to have effect and must be enforced according to its literal meaning.

Further, Plaintiffs have not alleged mere technical violations of the FCA, instead Plaintiffs have provided this court with evidence in their Second Amended Complaint that Defendant engaged in a continual defrauding of the federal government, and routinely took steps to ensure the VA did not discover that Starkey was in violation of their contract.

Additionally, the Data Translation case cited by Defendant is in no way controlling on this court, and should not be considered as persuasive. On its fact, Data Translation is easily distinguishable, and decisions of other courts show that the type of activity engaged in by Defendant is precisely of the type leading to FCA liability.

Finally, the statute of limitations does not limit Starkey's liability in this matter. The statue of limitations did not begin to run until the government made their final payment pursuant to the contract with Starkey. Even if the court disagrees with this interpretation of the statute of limitations, the Plaintiffs Original Complaint, still under seal, would likely bring all submissions by Starkey to the government within the statute of limitations period.

For all of the above reasons, Plaintiffs respectfully ask this court to deny Defendant's 12(b)6 motion to dismiss for failure to state a claim upon which relief can be granted.

Respectfully submitted,

WARCHOL, BERNDT & HAJEK

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